In the Supreme Court
of the United States

OCTOBER TERM, 1974

ROBERT BRADLEY JONES, HILDA STUBBINGS, SIDNEY FREEMAN, LLOYD SMITH, and MARY LOU IRVING, members of TAXPAYERS' INVESTIGATIONAL COMMITTEE OF OREGON, an unincorporated association,

Petitioners,

v.

GEORGE P. SCHULTZ, now by succession, WILLIAM E. SIMON, Secretary of the Treasury of the United States, and ROGERS C. B. MORTON, Secretary of the Interior of the United States,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 23, 1974.

OPINION BELOW

The opinion of the Court of Appeals is not re-

ported. (Appendix A, infra, p. 27). The opinion of the United States District Court of Oregon is not reported. (Appendix B, infra, p. 30).

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This case involves a direct and important conflict between the decision of the Ninth Circuit and recent decisions of the United States Supreme Court, to-wit:

Schlesinger, Secretary of Defense et al v. *Reservists Committee to Stop the War*, — U.S. —, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974).

United States et al v. *Richardson*, — U.S. —, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1944).

Baker v. *Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1961).

Assoc. of Data Processing v. *Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 192 (1970).

regarding:

(1) Petitioners' procedural right of STANDING,

and

(2) The most fundamental question of the rights of these petitioners and 18 counties in the State of Oregon under the McNary Act of 1937, 50 Stat. 874.

The rights sought by the complaint bring into the judicial arena two most serious questions of substance:

(1) The rights of the 18 counties and these citizen-taxpayer petitioners to the proper distribution of the funds deposited into the Oregon-California Land Grant Fund (Title II, McNary Act, supra).

(2) Oregon having a vested and beneficial right in the O&C lands against the government's claim that the United States has plenary and unbridled authority over these unique O&C lands. (*Oregon & California Railroad Co.* v. *U. S.*, 238 U.S. 393, 35 S. Ct. 908, 59 L. Ed. 1360 (1915); Chamberlain-Ferris Act of 1916, 39 Stat. 218).

The consideration of these historic and unique questions will bring into focus two vital queries:

(1) The philosophy of the Union applying equally to Oregon, namely, that Oregon has sovereign rights over these O&C lands.

(2) The duty of the United States government to carry out the decree of the United States Supreme Court that was implemented by the passage of the Chamberlain-Ferris Act and the McNary Act, supra.

STATUTES INVOLVED

Chamberlain-Ferris Act of 1916, 39 Stat. 218.
McNary Act of 1937, 50 Stat. 874.
Land Grant Acts (1866-70):
14 Stat. 239.

16 Stat. 49.
16 Stat. 94.
28 U.S.C.A. 1361.
Annual Appropriation Bills (See Appendix C, p. 32).

FORMER OPINIONS INVOLVED

Supreme Court Opinion, *Oregon & California Railroad Co.* v. *United States*, 238 U.S. 393, 35 S. Ct. 908, 59 L. Ed. 1360 (1915).

Clackamas County v. *McKay et al*, 219 F.2d 479 (C.A. D.C., 1954).

STATEMENT OF THE CASE

Petitioners seek a Writ of Mandamus compelling the Secretaries of Interior and the Treasury to comply with the McNary Act, supra.

This case involves two and one-half million acres of prime timber land in the Western half of Oregon. They are known as the Oregon-California Land Grant Lands and will be referred to as the "O&C" lands. All these lands are situated in Oregon.

Petitioners are Oregon citizens and taxpayers who reside in Clackamas County, Oregon and are members of an unincorporated association comprised of taxpayers of Clackamas County, known as the "Taxpayers' Investigational Committee of Oregon." They brought this action on behalf of themselves and other taxpay-

ers residing in Clackamas County and 17 other Oregon counties. Through a series of United States statutes and court decisions, there has been created a special fund called the Oregon-California Land Grant Fund. The McNary Act expressly provides, without one penny's discretion, the amount each of the 18 O&C counties are to receive annually.

To review the important history of the matter, during the Civil War, our national leaders recognized how unguarded our western flank was and how vulnerable we were to enemy attack. Consequently, in 1866, Congress, being aware of this problem, and wanting a railroad from Portland to connect with the transcontinental line that was completed (Central Pacific and Union Pacific), and glamorized by the pounding of the golden spike connecting the two lines at Promontory, Utah, made a substantial land grant to the Oregon & California Railroad Co.

The Central Pacific's most advantageous connecting point with the new railroad to be built northward was at Roseville, California. Congress knew that to defend and develop a new territory, it needed settlers and also needed transportation and communication. Consequently, in 1866, legislation was passed granting and conveying to two railroad companies, millions of acres to stimulate and promote the construction of a proposed new railroad that would assist in developing Northern California, Oregon and, eventually, the State of Washington.

The United States, in granting statehood to Cali-

fornia and Oregon, withheld the majority of the land for future granting to settlers by homestead and other means. In Oregon, the Admission Act of 1859 granted Oregon every 16th and 36th section for school purposes and additional land for a State capitol and also salt springs. The rest was retained in ownership by the United States. (The Admission Act provided that Oregon was to be admitted on equal footing with her sister states. Query: How is Oregon admitted on equal footing if the United States still retains 52% of the land?)

Going forward with the O&C history, in 1866, Congress granted four million acres to the Oregon & California Railroad. The railroad company receiving the grant had to be designated by the State legislature. The purpose of the particular grant was to have the railroad and telegraph lines constructed *from Portland to the California line*. During the same period, Congress granted a large quantity of land to the second railroad company, the California & Oregon Railroad Co., and its responsibility, under the same conditions, was to build the railroad and telegraph lines *from Roseville to the Oregon border*. Years later, after the railroad was completed, the two lines became the Southern Pacific Railroad.

There is rich history in the manipulation by railroad pioneers and developers and shocking and surprising historical revelations of the land frauds that resulted in many prominent persons and public officials being indicted. Our purpose here is to stay on

the main line and to point out events that corroborate, without a shadow of a doubt, that the 18 O&C counties have a vested interest in the O&C lands. We will try to stay away from the spur lines that have fascinating history but do not assist in the quick threading of our way from 1866 to 1974 that substantiates our claim that Oregon has a vested interest in these O&C lands and that the 18 O&C counties are entitled to 75% of the annual gross revenues from timber sales off these lands.

The original Granting Acts had two purposes. (1) To settle the Oregon country and (2) to assist in building the railroad. Both were mutually dependent upon the success of the other. Granting every odd section of land to the Oregon & California Railroad gave that railroad the right-of-way for the railroad and also the right-of-way for the telegraph line. The huge amount remaining was to be sold to actual settlers in parcels not to exceed 160 acres at a price not to exceed $2.50 per acre. Parenthetically, it should be told that prior to the Granting Acts, the land was being sold for $1.25 per acre. Upon the passage of the Granting Acts, the even sections were increased to $2.50 per acre. The end result is easy to see. Namely, the government did not lose because the settlers purchasing the even numbered sections picked up the tab for the odd sections the government gave and granted to the Oregon & California Railroad.

The grant included all of the odd sections in an area 20 miles on both sides of the railroad line. There had to be an adjustment, however, because by the time

of the grant, some of the odd sections had already been taken up so the government created an indemnity strip 10 miles additionally on both sides to make up for the odd sections that the railroad was entitled to have. The result is that the O&C lands are included in a 60-mile wide swath from Portland to the California line, thirty miles on each side of the track and being situated in 18 of Oregon's 36 counties.

The grant was accepted by the Oregon & California Railroad and the line was built. The land was being sold to actual settlers in accordance with the terms of the grant. After awhile, the situation changed. Of the four million acres, much of it was on hillsides and ravines, not suitable for agriculture. The railroad strayed away from the original conditions of the grant and started selling large parcels for sums far exceeding the $2.50 per acre.

Around the turn of the century, the railroad adopted the policy of flatly refusing to sell to the settlers. A lawsuit resulted between the settlers and the railroad and the United States Government intervened. The results of the litigation are as follows.

The U. S. District Court in Portland held that the railroad had violated the condition subsequent by refusing to sell land under the terms of the grant and that the unsold portion of the grant (approximately 2.5 million acres) reverted to the United States Government. *United States* v. *Oregon & California Railroad Co.*, 186 F. 861 (Or. 1912).

The United States Supreme Court reversed the

lower court's decision and said, "No, there was no condition subsequent but the railroad had violated an enforceable covenant." The court gave Congress six months to work out a reasonable solution. *Oregon & California Railroad Co.* v. *United States*, 238 U.S. 393 (1915).

In 1916, Congress passed the Chamberlain-Ferris Act and revested the land to the United States with a formula of selling the land to settlers and the distribution of the moneys from the sale of the land or of any timber thereon.

In essence, what occurred was that the government was carrying out the terms of the original grant which the railroad had violated and had refused to do. Also, it should be noted that revestment to the United States Government would be actually the same as reverting in defiance of the United States Supreme Court decision unless revestment was for the purpose of carrying out the terms of the 1866 grant and not placing the land back in the public domain. If it were the latter, it would be completely in defiance of the Supreme Court decision of 1915, supra.

Some of the land was sold but in the ensuing 21 years, from 1916 to 1937, it became crystal clear that much land would never be suitable for agricultural purposes and also with the demand for timber, it became readily apparent that there was a great need for a permanent shoring up of the forest lands so that there would be a program of sustained yield for the betterment of the local communities and also for the nation.

Based upon this recognition of the circumstances, the Congress passed the McNary Act in 1937. It is extremely important to realize at this juncture that the McNary Act allowed the government to do exactly what the railroad had done. That is to refuse to sell to settlers because the McNary Act said that the land would be held permanently as forest lands.

The motive of the government was different from the railroad but the end result, as far as getting the land into private hands and eventually getting it on the tax rolls, was the same.

At that time, the Congress, recognizing the inequities of the situation and that it was completely changing the policy of the Granting Acts and not carrying out the purposes as originally intended, made unique and completely different provisions for the 18 Oregon counties. Uniqueness was required because these lands had unconditionally left the public domain lands.

See excerpts from hearings, 75th Congress, Committee on Public Lands re H.R. 5858 April 13, 1937. (App. D, p. 33).

From the ordinary public domain lands, the government received 75% of the income and the local communities received only 25% in lieu of taxes but since the O&C lands were intended to be for private parties, consequently on the tax rolls, the Congress recognized that it had a solemn duty to make a unique disposition of the problem. Therefore, Title II of the McNary Act provides that 75% of the proceeds

go to the 18 counties and 25% to the United States Government for administration of the lands. There was a period when the third 25% would go to the United States Government to reimburse it for moneys it had expended on the O&C lands.

It should also be noted that the O&C lands have never cost the federal government any money. The lands have always paid their way. In 1952, the formula worked under the McNary Act and the counties received 75% of the proceeds from the sale of timber and 25% went to the United States Government for administration.

Commencing in 1953, improper negotiations between the Association of O&C Counties, an unofficial body, and the Congressional committees resulted in the compromise that there would be a 50/50 split. To carry out that improper compromise, Congress attached a rider to the appropriation bills appropriating silently the third 25% and making that a reimbursable item under the McNary Act.

It should also be noted here that the government had a solemn duty to spend the fourth 25% on administration and this it has not done. Since 1953, the government has covered into the General Fund of the United States the sum of $118,000,000.00 out of its fourth 25%. The law required that before they could cover this into the General Fund, it had to set it off against any reimbursable items that were charged against the third 25%. The silent appropriation bills, over a 20-year period, had made $178,000,000.00 a

reimbursable item against the counties' third 25%. The law requires any excess of the fourth 25% to be charged against any reimbursable items that were a lien against the third 25%. This the government did not do. (See breakdown App. L, p. 53).

In other words, what the government is doing, by its own discretion, without any yardstick from Congress, is deciding how much of the fourth 25% it wants to spend on administration, then takes the whole third 25% and put in any excess of the fourth 25% that it did not choose to cover into the General Fund. This is absolutely improper in accordance with the formula of the McNary Act. (See Title II, McNary Act of 1937, App. E, p. 35).

However, it should be noted that the taxpayers' contentions that one, Oregon has a vested interest in these lands and two, that the formula of 75%-25% should be carried out gain strength and are corroborated in many ways.

First, as to vested interest, the Revestment Act is the only reconveyance of land that the government has. The Revestment Act was not to put the land back in the public domain but to carry out the terms of the original grant. Therefore, the McNary Act gave the government no stronger right to the land other than what could come about under the Chamberlain-Ferris Act. In passing the McNary Act, the Oregon officials consenting and not objecting, and recognizing the uniqueness of the situation, relied on the fact that the formula would be carried out. The McNary Act, on

many occasions, refers to the dependence of the Oregon counties on these forest lands. Therefore, it was clear that this was a unique and solemn responsibility that the government had to these 18 Oregon counties.

So the government now contends that it has plenary power over the Oregon land just as if they were public domain lands. This is completely illegal and arbitrary. Some acts of Congress have a higher solemnity and go beyond being amended, repealed or modified by any future Congress. It is obvious that the Granting Acts and the Admission Act of Oregon to the Union cannot be repealed. The O&C legislation is in that same category. It has the sanctity of a contract between the two governments. For the federal government now to come along and claim plenary powers is to defeat the entire original purpose of the Granting Acts of 1866, the Chamberlain-Ferris Act and the McNary Act.

REASONS FOR GRANTING THE WRIT

A. Conflict with This Court and Other Courts Re Standing

1. Recent U. S. Opinions.

The Ninth Circuit, in denying standing, cited *Schlesinger, Secretary of Defense et al* v. *Reservists Committee to Stop the War et al*, — U.S. —, 94 S. Ct. 2925, 41 L. Ed. 2d 706. Both lower courts have failed to appreciate the fact that petitioners are not federal taxpayers in relationship to their status of standing. They do not fall within *Frothingham*, 262 U.S. 447,

43 S. Ct. 597, 67 L. Ed. 1078 (1923) and the case of the *United States et al* v. *Richardson*, — U.S. —, 94 S. Ct. 2940, 41 L. Ed. 2d 678 is more applicable where the court denied standing because of a taxpayer's and citizen's interest in the expenditures of the Central Intelligence Agency. Standing was denied on the basis that a federal court is not a forum in which to air general grievances of the federal government or the allocation of power in the federal system.

In this issue of standing, this particular case is unique and there are not any other citations or cases which are closely relevant. The court, in *Richardson*, supra, reaffirmed the appropriateness to look at the substantial issues to determine whether there is a logical nexus. We concur that our Founding Fathers did not set up an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in the federal courts.

In the case cited, the complaining party had a grievance that was basically general to all citizens or taxpayers and, particularly, being a federal taxpayer. Here, our remedy is solely judicial. The court alluded that dissatisfied citizens may resort to elective processes in changing their elected officials. Here, the grievance is not predicated on what one group or another group of elected officials may or may not do to an accrued specialized fund where rights are already crystallized. Even if the vote in the House of Representatives was 435 to 0 and the vote in the Senate was 100 to 0, that does not deprive the counties of

Oregon and, particularly, these petitioners, of their vested rights.

Our constitutional form of government is one primarily for the basic protection of the minority against the majority. The O&C lands came about pursuant to a court decree and upon judicial guidelines. This legislation is beyond modification and it would be an abuse of government power and in defiance of this Court's decision to, by the passage of time, enlarge a conditional conveyance into one of unconditional use.

Consequently, the Ninth Circuit erred in placing the petitioners in the position of a taxpayer, similarly referred to in *Schlesinger, supra*, or *Flast*, 392 U.S. 83 (1968). Actually, *Baker et al* v. *Carr et al*, 369 U.S. 186 (1961) is more appropriate authority by analogy for petitioners' position.

The Ninth Circuit also erred in basing its decision on the decision in *Schaeffer* v. *Sharp*, 328 F. Supp. 762 (S.D. Miss., 1971). The *Schaeffer* case has no similarity whatsoever. In that case, the challenge was against three Mississippi statutes in reference to the allocation of excise tax funds. A careful reading of that case will show that the taxpayers had no vested interest in the fund. Our petitioners do.

Also in point would be *National Resources Defense Council, Inc.* v. *Grant*, 355 F. Supp. 280 (1973). In our case, like the cite case, the Attorney General is lined up with the opposition and is in no way able to protect the rights of the Oregon counties and the petitioners.

The affirmative side of the standing issue becomes readily apparent when the substance of the issue is examined whereby this is a matter of honor between the officials of the United States Government and the people of the State of Oregon. This is no case of a generalized grievance and the Ninth Circuit is in error that even though every other O&C county taxpayer is also aggrieved, this is not the type of "general grievance" that the court is referring to in *United States* v. *Richardson*, supra.

The grievance is specific, the personal stake real. The assessment rate for 1973-74 in Clackamas County is $24.05 per thousand on real property. There are 87,987 taxpayer accounts. The budget to be raised by the County Assessor for the general county fund is $2,464,028. (See App. F, p. 38). The 1970 population of Clackamas County was 166,088. (Oregon Blue Book, p. 204).

If these petitioners prevail, it is into this same fund that these moneys are paid.

Clackamas County's share of the annual O&C funds is 5.5%. The latest figures for 1973-74 of the Office of the Bureau of Land Management is that the fund paid to O&C counties was $57.7 million. Clackamas County received $3.2 million. If the formula was legally carried out, the O&C proceeds should have been $86.5 million and Clackamas County's share would have been $4.8 million. The additional amount of $1.6 million is over one-half of the budget. A taxpayer with a $20,000 evaluation, paying $481.00 in

taxes, would have had his taxes reduced by more than one-half or would have had a substantial increase in services.

Can anyone say this is "minute or indeterminable"? The measurement for nexus and personal stake is not based on status as a federal taxpayer but as a citizen and local taxpayer. See *Burness* v. *Multnomah County*, 37 Or. 460, 60 P. 1005 (1900); *Brownfield* v *.Houser*, 30 Or. 534, 49 P. 843 (1897); *Childs* v. *Marion County*, 163 Or. 411, 97 P.2d 955 (1940).

STANDING ALLOWED — LIBERALIZED FORMULA

National Welfare Right Organization v. *Finch*, 429 F.2d 725 (1970); Economic injury within zone of interest to be protected by statute. *Association of Data Processing* v. *Camp*, 397 U.S. 150, 153, 90 S. Ct. 827 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 90 S. Ct. 832; Because injury is widespread, no reason to deny standing; *U. S.* v. *Scrap*, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973).

Plaintiff well situated to represent an element of public as private attorney generals. *National Resources Defense Council* v. *Grant*, 355 F. Supp. 280 (1973).

Type of concrete adverseness necessary. *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, special interest adversely affected; *Sierra Club* v. *Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636.

The uniqueness of the substance of the issue gives

uniqueness to the standing of the petitioners. The original Granting Acts supported by the 1915 Supreme Court decision, supra, establish basic rights. This was implemented by the Chamberlain-Ferris Act in 1916 and amended by the McNary Act in 1937. The public officials have a duty to carry out and enforce the rights of the citizens and taxpayers of Oregon but the residual rights are not in the elected officials but in the people. (Oregon Constitution, Art. I, §§ 1, 10). If elected county officials and federal officials fail to carry out nondiscretionary duties, why doesn't the residual beneficiary have standing?

Oregon's leading newspaper, The Oregonian, editorially is deeply concerned with the issue of standing. (App. G, p. 39).

Ninth Circuit Failed to Follow Oregon & California Railroad Co. v. U. S., 238 U.S. 393.

B. The Ninth Circuit and lower court have failed to decide an important state and federal question in compliance with an earlier decision of this Court, *O. C. C. R.* v. *U. S.*, supra, and have failed to carry out the provisions of the McNary Act, resulting in a conflict between the said 1915 U. S. Court opinion and the practices of the Secretaries of Interior and Treasury.

The said Secretaries are not complying with the nondiscretionary and accrued rights established under Title II of the McNary Act.

Important Federal-State Question Should Be Decided by This Court.

C. The O&C question is a unique and fundamental issue involving the principle of the Union and is an important question involving federal and state relations and should be settled by this Court. There is no other tribunal that can now resolve this tremendous question.

Our history of federalism was based on a compromise between nationalism and confederation. Our system of government is founded on three libertarian principles:

1. Popular consent;

2. Prescribed limitations; and

3. Central government and the States possess sovereignty in their own respective spheres.

The Union is a coexistence of powers divided between the central government and the states. The central government could exercise only those powers specifically delegated to it.

The 10th Amendment to the U. S. Constitution expressly emphasized this division of power. It was a solemn pledge that adherence to this salutary principle would make it impossible for the national government to encroach on the 'sovereignty" of the States and the guaranteed freedoms of the citizens.

The concept of the national government retaining state lands in the beginning of the Union did not exist.

This concept became a practice, particularly with the 11 western states. Oregon, when admitted in 1859, was granted the 16th and 36th section of each township, plus lands for the capital buildings and some salt springs. Surely, no one would doubt that the government had a moral and legal responsibility to dispose of the land as soon as possible to settlers. Otherwise, the new state would be a colony and not a state admitted on equal footing.

It is truly incredible that basic fundamentals can be circumvented for so long and even our elected officials sit idly by and make no effort to stand on the solid ground that Oregon has sovereign rights in her own sphere.

Oregon's sovereignty over the O&C lands came into legal reality when Congress, by the Granting Acts, conveyed four million acres to a private party, the Oregon & California Railroad Company. In 1915, the U. S. Supreme Court (*Oregon & California Railroad* v. *United States*, 238 U.S. 393) expressly stated that there was no condition subsequent, hence no reverting of the lands to the federal government.

The court, however, in that decision, did urge Congress to solve the problem that involved the Oregon & California Railroad Co.'s violating an "enforceable covenant." If Congress refused, the court would enlarge its decree and provide for the proper disposition of the problem.

Right here, it should be noted that the legislation which was passed by Congress was pursuant to a court

decree and not voluntary legislation originated by Congress. This is extremely important because the legislation passed has to be in conformity with the decree and not otherwise. Passage of time does not dull this responsibility.

The legislation passed by the Congress was the Chamberlain-Ferris Act of 1916. It is known as the Revestment Act. A careful reading of the hearings and the Act will convince one that the revestment was for the sole purpose of the United States Government carrying out the terms of the Granting Acts and not a *conveyance* placing the land back into the public domain. There were express conditions on how to dispose of these O&C lands to settlers.

Twenty-one years passed and most everyone agreed that the remaining two and one-half million acres were located on hillsides and ravines and not suitable for agricultural use. It was in 1937 that Congress passed the McNary Act, supra, that provides for permanent forest holding of this land for sustained yield.

The Oregon & California Railroad had the land taken away because it refused to sell to settlers. The United States Government did the same thing but the government's motives were altruistic while the Oregon & California Railroad's motives were not. Now the government has a poor memory.

Under the terms of the original Granting Acts, the O&C lands were in private ownership. Oregon's sovereignty attached. Not ownership but the elements of

State sovereignty. Oregon could tax, foreclose for non-payment, condemn, zone, etc. These are the acts of a sovereign. These lands were not condemned by the United States, nor were they abandoned, nor a gift, nor a sale. Oregon's sovereignty is not in conflict with national sovereignty.

The Chamberlain-Ferris Act did not place these lands back into the public domain—nor did the McNary Act.

The basic concept of Union has political overtones, as well as legal. The War between the States established beyond any question that the American Republic was, as the court said in *Texas* v. *White*, 74 U.S. 700, 19 L. Ed. 227 (1869), "an indestructible Union composed of indestructible States."

This made it clear that no state could flout the legitimately exercised authority of the National Government. Here is where the line of integrity must be drawn. The States are significant units of government and the delicate constitutional balance of American federalism still remains. The States are subject to the "indestructible Union" pronouncement but the federal government has an equally legal, political and moral duty not to infringe on matters that are peculiarly within the province of the States. Raw use of power by the National Government can destroy the integrity of the States — thus the Union. States would be reduced to administrative units.

These O&C lands are prime lands in the State of Oregon. Congress made an outright grant and the

land returned not in fee but for the purpose of carrying out the original intent of the Granting Acts.

In 1937, when the consensus was that these lands should be firmed up for permanent forest lands, the authors of the McNary Act realized that this land would never return to Oregon for private ownership and taxation. In carrying out the spirit of the Granting Acts, the *Oregon & California Railroad Co.* v. *United States* decision, supra, resulting in the Chamberlain-Ferris Act, the Congress made solemn provisions that would eventually provide that the O&C counties would receive 75% of the gross timber sales and the United States would receive 25% for administering the lands.

The McNary Act stresses time and time again the economic dependence of these 18 counties upon these timber lands. There can be no question that Oregon has a vested interest in these lands.

In the event that the maintenance of the O&C lands requires more than 25% for administrative purposes, there is an orderly method for the federal and state governments to achieve that result without circumventing the law.

The hearings pertaining to legislation over the years corroborate petitioners' contention that the O&C lands were not revested for absolute control by the United States but to carry out the terms of the original Granting Acts. (See Hearings before Committee on Public Lands, 64th Congress, February 17, 1916 through March 14, 1916; Hearings before Committee

on Public Lands, H.B. 5858, 75th Congress, April 13, 1937; and Hearings before Committee on Public Lands and Survey, U. S. Senate, 78th Congress, pursuant to S. 275, May 6, 7, 1943.

McNARY ACT POLICY CHANGE

The McNary Act was a major change in policy by the United States Congress. Since the United States government was not going to sell to settlers any more, hence the land would not be on the tax rolls, this special legislation was enacted and the United States government cannot now change the goal posts and by the passage of time, enlarge the Revestment Act to mean an absolute grant to the public domain. If this happens, the United States has lost its integrity and broken faith with Oregon.

OREGON WON'T LET THIS ISSUE DIE

The Oregon Legislature, in 1951, passed Senate Joint Memorial No. 6, requesting federal legislation transferring these O&C lands back to Oregon. (App. H, p. 40).

The Oregon Journal, an outstanding Portland newspaper, concerned itself editorially on this subject. (App. I, p. 42; App. J, p. 48; App. K, p. 52).

Numerous other editorials have supported plaintiffs' position.

OREGON WANTS TO MAINTAIN FIRST CLASS STATEHOOD

If the Government's position is substantiated, Oregon has been reduced to second class Statehood. Why should the Oregon delegation to Congress have to go there with hat in hand to beg for what is rightfully ours or to remain quiet so we don't "rock the boat" and cause our national leaders to become upset with us. Both are degrading and contrary to the *law.*

O&C MONEY SUBSTANTIAL

This year, the receipts were $115.4 million. Oregon was paid only 50%, or $57.7 million. When you consider the amount of land taken off our tax rolls, this is not an exhorbitant amount but that is not the point anymore. The rights have been established and the federal government has no discretion.

CASE SUBMITTED FOR FINAL DETERMINATION

The defendant Secretaries moved for Summary Judgment and all parties stipulated before the court that the case was submitted for final determination. (Tr. 1-4). This case should be determined on the substance of the issue by this Court. Judicial economy would be served by this Court making a determination on substance. It is all in the record. *Romco* v. *Internat'l Terminating Co.*, 358 U.S. 354, 357; *Smith* v. *Govt. of Virgin Islands*, 329 F.2d 135.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

DONALD C. WALKER
2314 Lloyd Center
Portland, Oregon 97232
Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BRADLEY JONES, HILDA STUBBINGS, SIDNEY FREEMAN, LLOYD SMITH, and MARY LOU IRVING, members of TAXPAYERS' INVESTIGATIONAL COMMITTEE OF OREGON, an unincorporated association, *Appellants*,	No. 73-2790
vs.	MEMORANDUM
GEORGE P. SCHULTZ, Secretary of the Treasury of the United States, and ROGERS C. B. MORTON, Secretary of the Interior of the United States, *Appellees.*	

[July 23, 1974)

Appeal from the United States District Court
District of Oregon

Before: KOELSCH and KILKENNY, Circuit Judges, and McGOVERN, District Judge.*

Appellants are members of the Taxpayers' Investigational Committee of Oregon, an unincorporated association composed of taxpayers of Clackamas County, Oregon. They brought this action on behalf of themselves and all other taxpayers residing in Clackamas County, and seventeen other Oregon coun-

* The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

ties, all of which comprise the Oregon and California Railroad Land Grant Counties (O&C Counties), to compel payment by the United States Secretaries of the Treasury and Interior of the full 75% of the revenues derived from the sale and production of timber on the "O & C" lands, as provided for in the McNary Act, Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. § 1181f.[1]

Both parties concede that only 50% of the revenues derived from the "O & C" lands are presently turned over to the counties. Since 1953, Congress has, in its annual Interior Department Appropriation Acts, provided for a reallocation of the contested 25% in revenues to the Department of the Interior, for "maintenance" of the "O & C" lands. *See, e.g.*, Department of the Interior and Related Agencies Appropriation Act of 1973, 86 Stat. 508 (1973).

The complaint sought mandamus and injunctive relief to compel payment of $178,742,339.00, the amount constituting the purported improperly withheld revenues. Appellants contended that by law the "O & C" Counties were entitled to a full 75% of the revenues. The Counties are not in sympathy with appellants' claims and are not parties to the action.

The government filed a motion to dismiss the complaint in part, on the grounds that: (1) the action was

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[1]) The McNary Act, 43 U.S.C. § 1181f (a)-(b), provides that 50% of the revenues derived from the "O & C" lands will go directly to the eighteen "O & C" Counties, and an additional 25% will go to the same counties after all taxes and reimbursable charges have been paid, the situation before us now.

not prosecuted in the name of the real parties in interest, and (2) that the appellants lacked standing to maintain the action. The district court dismissed the action on those grounds. We affirm.

Under Rule 17(a), FRCivP, a party bringing an action must be the real party in intetrest. While admittedly, appellants are taxpayers and citizens in one of the affected counties, it seems clear that the contested revenues, even if owing to the counties, would be paid to the counties directly, and not to each individual taxpayer or the taxpayer's association. In these circumstances, appellants are not the real parties in interest. *Schaeffer* v. *Sharp*, 328 F. Supp. 762 (S.D. Miss. 1971), a three-judge case, is closely in point.

Additionally, even though appellants have failed to challenge the constitutionality of the contested revenue allocations, had they done so, standing to maintain the action would still not be present. Obviously, appellants' interest in the outcome of the dispute is no different from that of every other "O & C" County taxpayer. As such, the requisite "stake" in the outcome of the controversy is lacking. *Schlesinger* v. *Reservists to Stop the War*, — U.S. — (June 25, 1974); *Flast* v. *Cohen*, 392 U.S. 83, 102-03 (1967); and *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT BRADLEY JONES, HILDA STUBBINGS, SIDNEY FREEMAN, LLOYD SMITH, and MARY LOU IRVING, members of TAXPAYERS' INVESTIGATIONAL COMMITTEE OF OREGON, an unincorporated association, *Plaintiffs*,	)	Civil No. 73-94
vs.	)	OPINION
GEORGE P. SCHULTZ, Secretary of the Treasury of the United States, and ROGERS C. B. MORTON, Secretary of the Interior of the United States, *Defendants.*	)	AND ORDER

SOLOMON, Judge:

Defendants filed a motion to dismiss and in the alternative for summary judgment, in which they asserted, among other things, that plaintiffs' complaint fails to state a claim upon which relief can be granted; that the Court lacks jurisdiction because the action is against the United States and exceeds $10,000.00; that the plaintiffs lack standing to maintain the action; and that this is an unconsented action against the United States.

I am of the opinion that the plaintiffs' complaint fails to state a claim upon which relief can be granted. Nevertheless, I do not reach that ground because I believe that this Court does not have jurisdiction because:

(1) The plaintiffs are not the real parties in interest;

(2) The plaintiffs have no standing to maintain this action;

(3) This action is really an unconsented action against the United States exceeding $10,000.00.

This action should be and is dismissed.

Dated this 16th day of July, 1973.

Gus J. Solomon
United States District Judge

APPENDIX C

ANNUAL APPROPRIATION BILLS

Act of July 9, 1952, P.L. 82-470, 66 Stat. 445, 447; Act of July 31, 1953, P.L. 83-172, 67 Stat. 261, 263; Act of July 1, 1954, P.L. 83-465, 68 Stat. 361, 363; Act of June 16, 1955, P.L. 84-78, 69 Stat. 141, 142; Act of June 13, 1956, P.L. 84-573, 70 Stat. 257, 258; Act of July 1, 1957, P.L. 85-77, 71 Stat. 257, 258; Act of June 4, 1958, P.L. 85-439, 72 Stat. 155, 156; Act of June 23, 1959, P.L. 86-60, 73 Stat. 92, 93; Act of May 13, 1960, P.L. 86-455, 74 Stat. 104, 105; Act of August 3, 1961, P.L. 87-122, 75 Stat. 246; Act of August 9, 1962, P.L. 87-578, 76 Stat. 335; Act of July 26, 1963, P.L. 88-79, 77 Stat. 96, 97; Act of July 7, 1964, P.L. 88-356, 78 Stat. 273; Act of June 28, 1965, P.L. 89-52, 79 Stat. 174; Act of May 31, 1966, P.L. 89-435, 80 Stat. 170; Act of June 24, 1967, P.L. 90-28, 81 Stat. 59; Act of July 26, 1968, P.L. 90-425, 82 Stat. 425, 426; Act of October 29, 1969, P.L. 91-98, 83 Stat. 147; Act of July 31, 1970, P.L. 91-361, 84 Stat. 669; Act of August 10, 1971, P.L. 92-76, 85 Stat. 229; Act of August 10, 1972, P.L. 92-369, 86 Stat. 508.

APPENDIX D

EXCERPTS FROM HEARINGS ON THE COMMITTEE ON PUBLIC LANDS

75th Congress
H.R. 5858, April 15, 1937

Statement of Rugus G. Poole, Esq., Assistant Solicitor of the Secretary of Interior:

"Adjudging the Railroad Company of abrogating these conditions, the Congress passed an Act forfeiting to or revesting these lands in the United States. This Act is commonly known as the Chamberlain-Ferris Act. Its main object was to carry out the originally planned disposition and maintain the relative rights of interested parties under the original Granting Act."

* * * * *

Mr. Mott: The purpose of the act was to revest these lands in the Government because the railroad company had violated some of the conditions of the grant, and for the Government to reimburse these counties for the loss of the taxes which the lands would have paid had they remained in private ownership, as the original grant contemplated, and that was about $480,000 a year.

* * * * *

Mr. Mott: The purpose of that act, Mr. Lemke, I think can most clearly be explained by saying that it was the intention of Congress to put the land-grant counties as nearly as possible in the position that they

would have been in had this land remained in private ownership and had the counties continued to receive taxes.

* * * * *

Mr. Mott: I know that is your view and that is the view of the Interior Department, but that has never been the view of Congress, nor is the solution of the problem which Congress agreed to in 1916 when the lands were revested, and in 1926, when the act was perfected by amendment. The policy of the United States in that regard has already been settled. Now, I know that you have a different viewpoint, but I do not see any merit or fairness in comparing the revenue produced from these revested grant lands and that from Federal lands that were never in private ownership, and which we never had the right to tax. These lands now in the ownership of the Federal Government were taken off the tax rolls by the Federal Government without our consent and by reason of circumstances with which we have nothing to do, and because they were taken off the tax rolls by the Government, the Federal Government undertook by the revestment law to reimburse us. I do not think there is any fairness in comparison of revenues under the revestment act and under the National Forest Act.

APPENDIX E

McNARY ACT of 1937, 50 Stat 874

TITLE II

That on and after March 1, 1938, *all moneys deposited* in the Treasury of the United States *in the special fund designated* the "Oregon and California land-grant fund" shall be distributed annually as follows:

(a) *Fifty per centum to the counties* in which the lands revested under the Act of June 9, 1916 (39 Stat. 218), are situated, to be payable on or after June 30, 1938, and each year thereafter to each of said counties in the proportion that the total assessed value of the Oregon and California grant lands in each of said counties for the year 1915 bears to the total assessed value of all of said lands in the State of Oregon for said year, such moneys to be used as other county funds.

(b) *Twenty-five per centum to said counties as money in lieu of taxes accrued* or which shall accrue to them prior to March 1, 1938, under the provisions of the Act of July 13, 1926 (44 Stat. 915), and which taxes are unpaid on said date, such moneys to be paid to said counties severally by the Secretary of the Treasury of the United States, upon certification by the Secretary of the Interior, *until such tax indebtedness as shall have accrued prior to March* 1, 1938, *is extinguished.*

From and after payment of the above accrued

taxes said 25 *per* centum *shall be accredited annually to the general fund in* the Treasury of the United States *until all reimbursable charges against the Oregon and California land-grant fund owing to the general fund in the Treasury have been paid: Provided,* That if for any year after the extinguishment of the tax indebtedness accruing to the counties prior to March 1, 1938, under the provisions of Forty-fourth Statutes, page 915, the total amount payable under subsection (a) of this title is less than 78 per centum of the aggregate amount of tax claims which accrued to said counties under said Act for the year 1934, there shall be additionally payable for such year such portion of said 25 per centum (but not in excess of three-fifths of said 25 per centum), as may be necessary to make up the deficiency. *When the general fund in the Treasury has been fully reimbursed for the expenditures which were made charges against the Oregon and California land-grant fund said* 25 *per centum shall be paid annually, on or after* June 30, *to the several counties* in the manner provided in subsection *(a)* hereof.

(c) *Twenty-five percentum* to be *available* for *the administration* of this Act, in such annual amounts as the Congress shall from time to time determine. *Any part of such per centum not used for administrative purposes shall be covered into the general fund of the Treasury of the United States: Provided, That moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the Oregon and California land grant fund mentioned in*

subsection (b) so long as any such charges shall exist.

All Acts or parts of Acts in conflict with this Act are herby repealed to the extent necessary to give full force and effect to this Act.

Approved, August 28, 1937.

APPENDIX F

COUNTY OF CLACKAMAS
ASSESSOR'S OFFICE

168 Warner Milne Road Oregon City, Oregon

October 10, 1974

Donald C. Walker
Attorney at Law
2314 Lloyd Center
Portland, Oregon 97232

Dear Sir:

Pursuant to our telephone conversation of October 9, 1974, the following is the information you requested.

The average tax rate in Clackamas County for the 1973-74 year was $24.05 per thousand.

The taxes certified to be collected for Clackamas County General Fund was $2,464,028.63, for 1973-74 year.

If you have any questions please feel free to call me.

Yours very truly,
Juanita Orr
JUANITA ORR
Clackamas County Assessor

JO/mj

P.S. *1973-74*

87,987	Real Property Accounts
6,209	Personal Property Accounts
5,192	Mobile Home Accounts

APPENDIX G

EDITORIAL

THE OREGONIAN

TUESDAY, JULY 30, 1974

NO 'STANDING'?

We would still like to know whether the federal Treasury owes $178 million to the 18 Oregon O&C land grant counties and their citizens, or not.

The U. S. Ninth Circuit Court of Appeals in San Francisco did not rule on the question the other day in affirming dismissal of the case in Portland District Court. Instead it said the appellants, a group of Clackamas County citizens, did not have standing to sue because the money, if paid, would not go directly to them. The 18 counties did not join the suit, fearful that Congress would retaliate by reducing their take from O&C timber sales.

The McNary Act in 1937 provided that 75 per cent of O&C timber sales returns would go to the counties but since 1953 Congress has taken 25 per cent of that for "maintenance," under an informal agreement with the counties.

The complexities of O&C legislation and formulas for distribution of earnings have been argued ably in the courts by Donald C. Walker, Portland attorney. But the courts won't rule on the substance of his arguments. It does seem to the layman that citizen taxpayers have an interest equal to if not greater than that of county officials who represent them. The U. S. Supreme Court may be asked to say so.

APPENDIX H

SENATE JOINT MEMORIAL No. 6

To the Honorable Senate and the House of Representatives of the United States of America, in Congress assembled:

We, your memorialists, the Senate and House of Representatives of the State of Oregon, in legislative session assembled, most respectfully represent and petition as follows:

Whereas the revested Oregon and California grant lands now administered by the Secretary of the Interior of the United States under the provisions of the Act approved August 28, 1937, (50 stat. 874) were originally granted to the railroad company for the purpose of building and settlement of the State of Oregon; and

Whereas such lands, by reason of their mountainous nature, were unsuited for sale to agricultural settlers and Congress thereafter forfeited the grant to the railroad company for violation of terms of the grant, the lands have been revested in the United States; and

Whereas Congress has the power to enact legislation transferring title of such lands to the State of Oregon subject to such terms and conditions as it may impose; and

Whereas it shall be the policy of the State of Oregon to retain title to such lands, and to administer

efficiently such lands for the benefit of the people of Oregon; now therefore,

Be It Resolved by the Senate of the State of Oregon, the House of Representatives jointly concurring therein:

That the Congress of the United States be and it hereby is memorialized to pass such legislation as will result in the transfer of the title of such lands to the State of Oregon, subject to such terms and conditions as the Congress of the United States may deem just and equitable in the circumstances.

Filed in the office of the Secretary of State April 27, 1951.

APPENDIX I

EDITORIAL PAGE OF THE OREGON JOURNAL PORTLAND

If we live in the Spirit, let us also walk in the Spirit — Galations 5:25.

1/20/52

$1 BILLION O&C LAND DEAL

If you had a legitimate claim on a billion dollars worth of Oregon timber land now held in trust by the government, would you pass it up?

If you had an established claim on 75 per cent of the returns from this land, would you settle for less — say half that amount?

If you had another equally valid claim upon at least 50 per cent of a $5 million trust fund tied up in jurisdictional dispute between the department of agriculture's forest service and the department of interior's bureau of land management, would you let it lie?

An obvious "no" answer is indicated to all three questions. But, strangely enough, members of the Oregon delegation in the congress and members of the Association of Oregon and California Land Grant Counties (O&C) are debating all three questions.

At the moment, they show no inclination to try to regain state sovereignty over the 2½ million acres of O&C lands bearing some 50 billion feet of merchantable timber. They merely shrug the whole thing off as impracticable.

They appear willing to waive their claims, under the McNary Act of 1937, to 75 per cent of the returns from timber sales from O&C lands — to which they are entitled for the first time this year — and accept a lesser amount.

Satisfied With Split

They are not even in agreement on a suit instituted by the Lane county court to compel disbursement of the $5 million accumulated in the timber sale fund from half a million acres of "controverted" land claimed by both forest service and the bureau of land management.

The 13 Oregon counties in which the O&C lands lie appear satisfied with the 50-50 split they have enjoyed up to this year (amounting to $3.2 million last year). They have authorized Frank Sever, their attorney, to go to Washington and accept that kind of settlement. And this attitude has been reflected by Senator Guy Cordon, who formerly represented them, and by Representative Harris Ellsworth, who introduced companion bills at the last session, providing for perpetuation of the old 50-50 arrangement.

They have finally decided, however — as has Senator Cordon — to fight the interior department's bill which would give the Oregon counties about 32 per cent and BLM 68 per cent of future returns from O&C timber lands.

But other Oregon congressmen have shown little interest. This despite the fact that the 1951 Oregon

legislature almost unanimously memorialized the congress to transfer trusteeship of O&C lands back to the state of Oregon which exercised sovereignty over these lands for 37 years.

Lafferty Stirs Things Up

And neither the Oregon congressmen nor most Oregon editors have taken seriously the determined campaign of A. W. Lafferty, former Oregon congressman, for a better deal for Oregon on O&C lands.

We have reexamined the whole O&C lands issue, since we approved the legislature's joint memorial last spring.

We have come to the conclusion first, that the O&C timber lands controversy is of utmost importance to the state of Oregon. The fact that O&C timber sales are now being made at the rate of $10 million a year and may some day reach $100 million a year on a sustained yield basis is, of itself, sufficient evidence to support this position.

We also have come to the conclusion that the state's claims to O&C lands are valid, under the U. S. supreme court decision of 1915 and under the Chamberlain, Stanfield and McNary acts. Editor Walter W. R. May of the Oregon City Enterprise-Courier agrees. So do County Judge Day T. Bayly of Lane county and State Senators Jack Lynch and Howard Belton, who sponsored the Oregon legislature's O&C land memorial to congress.

We are surprised that editor Charles Sprague of

the Oregon Statesman is so readily inclined to belittle Oregon's claims, while supporting the move of Lane county to seek apportionment of the $5 million in the "controverted" land fund. The fact that Mr. Sprague is a member of the bureau of land management advisory committee may explain it.

We were disappointed in the willingness of Senator Cordon to compromise Oregon's claims to 75 per cent of O&C timber sales, but we're glad to note that he has withdrawn his amendment to the McNary act and will oppose the interior department's drastic bill.

Os West Had 'Pipe Dream'

We are startled to see that "Os" West, doughty fighter and former governor who once declared for returning sovereignty over O&C lands to the state, now feels that it was merely one of his pleasant "pipe-dreams."

Perhaps, as editor Sprague assumes, Mr. Lafferty is attempting to ride back into congress on the O&C land issue. We don't know or care. We merely think he happens to be right about the O&C issue.

The state's sovereignty over O&C lands was recognized in the original grant of 1868. This grant to the Oregon & California railroad contained a settler's clause, providing that the land was to be sold to settlers at not to exceed $2.50 an acre and in blocks not to exceed 160 acres. Thus the land became "state land." It was held in trust by the O&C railroad for development of the state. It went on state and county

tax rolls. And it remained there until 1915, after a Portland federal judge found the railroad in violation of the settlers' clause and ordered the lands forfeited.

Should Try to Regain Lands

But the U. S. supreme court completely reversed the Portland decision. It held that the original congressional grant was final and issued an injunction against further violations of the grant. It recognized railroad and tax claims. The congress then amended the law, "revesting" the lands in the government for administrative purposes and setting forth the method of distributing O&C proceeds to the government, the state and the counties and of paying back taxes and reimbursing the railroad. The decision was never successfully challenged.

The railroad in 1916 did protest the decree entered by the federal court at Portland in conformity with the supreme court's decision. The railroad raised the point for the first time that the timber and minerals were separate from the lands and that, while the grants required the company to sell the lands to actual settlers, this did not include the timber and minerals. The supreme court rejected the contention and confirmed its original opinion. It did allow the railroad $6250 to pay the cost of its original appeal from the lower court's decree of forfeiture which was reversed.

The very fact that congress ordered the land "revested" in the government indicated that it had actually been vested in private ownership for 37 years. It is unfortunate that the state did not then assert its

claims to the land and did not stand on the constitutional provision that lands can be acquired for federal use only with state consent.

In light of this situation, we believe that the state, through its congressional delegation, should attempt to regain sovereignty over O&C lands as requested by the 1951 legislature.

Oregon should take its claim to the U. S. court of claims, then to the congress where states' rights sentiment is growing.

The Association of Oregon & California Land Grant Counties and the Oregon delegation in congress also should make a determined fight against the department of interior's attempt to raid the O&C timber sale fund. The land-grant counties have the money and the legal talent to do it and Oregon congressmen should have the intestinal fortitude to carry on the fight. Governor McKay should be interested.

And the argument over the controverted lands trust fund should be taken to court. Oregon counties have an equally valid claim on this fund.

Shall we fight for our O&C land rights or yield? Federal bureaucracy already owns or controls 56 per cent of our land. That's too much.

Our hunch is to fight — on all three fronts.

APPENDIX J

EDITORIAL - OREGON JOURNAL
IT'S OUR O&C MONEY

Date January 1951

Clackamas and Lane county commissioners are both consistent and wise to bring suit for their counties' share of the so-called "controverted lands" trust fund which now totals approximately $5 million.

At least 50 per cent of this fund (held in trust while the department of interior and department of agriculture settle their jurisdictional dispute over a half million acres of O&C land) belongs to 13 Oregon counties.

Five other O&C counties hold none of the controverted land and therefore have no interest in this particular trust fund. But the 13 counties are entitled to their proportionate share of it. They should collect it.

Why still other counties do not join the Clackamas and Lane suits is beyond us. They have everything to gain and nothing to lose by such an action. Both the supreme court and the congress have held that the controverted land — about one fifth of the 2½ million acres embraced in the original grants to the Oregon & California railroad and revested 37 years later in the government for administrative purposes—is O&C land.

The 13 counties having claims on the impounded timber returns from this land have a perfect case.

The case is so good that A. W. Lafferty, congressional candidate and No. 1 champion of Oregon's claims to O&C lands, believes a peremptory court order could be obtained, without resort to long-winded hearings in the U. S. court of claims.

Back to the controverted lands issue is the much broader question of the proper division of timber returns from all O&C lands.

Under pressure from the department of agriculture, which has written a bill giving it control of all O&C lands, and the department of interior, which for years has attempted to preempt an ever-greater share of the returns from O&C timber, Senator Cordon and Representative Ellsworth have reintroduced identical bills, S 1385 and HR 4005.

These bills would reduce the share of 18 Oregon counties in O&C timber sales from the current 75 per cent (effective last year under the McNary act) to 50 per cent.

If this bill goes through, Clackamas county's share will be cut from a current $246,000 to approximately $180,000—a loss of about $66,000 a year on the basis of current timber sales.

Lane county, which stands to collect almost $760,000 a year from its O&C lands (including the controverted lands) will be hit even harder. Douglas, Jackson and other counties will suffer losses varying with their proportionate claims on O&C land funds.

An even worse deal than this one is now proposed

by five of the six members of the executive committee of the Association of Oregon & California Land Grant counties (County Judge Wallace Telford of Clackamas county dissenting). This committee agreed to empower the association's attorney, Frank Sever, to accept a $3 million a year "floor payment" in lieu of the 75 per cent to which the counties are entitled under the law.

This deal would limit Clackamas county's share of O&C timber sales to about $156,000 a year. A clear net loss of at least $90,000 a year in perpetuity would result. And Lane county would be hit much harder.

The only excuse we can think of for acceptance of either of these deals is that they might appease the department of interior, which would like to amend the Cordon-Ellsworth percentage bill to give Oregon counties only 31 per cent of the proceeds from O&C lands, the government hogging the balance.

Frankly speaking, we don't like any part of these two appeasement moves. We believe that Oregon congressmen and Oregon counties are being coerced by Washington bureaucrats into yielding firmly established rights to 75 per cent of the proceeds from these O&C lands.

We believe that Judge Telford and Commissioners Jones and Skoko of Clackamas county, District Attorney Leonard Lindas and special counsel Alden Miller are right in fighting it out, first, for immediate division of the $5 million controverted land trust fund and, second, against any reduction in the Oregon coun-

ties' share in O&C timber sales. The same goes for Lane county commissioners and District Attorney C. E. Luckey.

Despite the publicly expressed fears of Senator Cordon, Representative Ellsworth and attorney Sever, we do not believe that the congress will be a party to any such bureaucratic raids on O&C land funds.

If we weaken now, we might as well throw in the sponge, writing off valid claims to some $7½ million a year. This would be a staggering blow to the tax structures and economies of 18 Oregon counties.

APPENDIX K

WE WANT TO CUT YOUR SHARE OFF HERE
NO! YOU'LL CUT IT HERE, AS THE LAW PROVIDES
18 OREGON COUNTIES
FEDERAL BUREAUCRACY
$7 MILLION PER YEAR TO COUNTIES
$3 MILLION PER YEAR TO COUNTIES
$10 MILLION FROM O+C TIMBER LANDS PER YEAR
HF

APPENDIX L

McNARY ACT of 1937

Title II Formula

Sub-Paragraph (a)	
50%	To the 18 O&C Counties.
Sub-Paragraph (b)	
25%	1. Reimburse gov't. for all advances past due a/c lands. 2. Balance to counties.
Sub-Paragraph (c)	
25%	(1) To gov't for administration. (2) Balance to General Fund. (3) Provided: NO reimburseable items remaining in (b) above...

74-444

NOV

In the Supreme Court

of the United States

OCTOBER TERM, 1974

ROBERT BRADLEY JONES, HILDA STUBBNGS, SIDNEY FREEMAN, LLOYD SMITH, and MARY LOU IRVING, Members of TAXPAYERS' INVESTIGATIONAL COMMITTEE OF OREGON, an unincorporated association,

Petitioners,

vs.

GEORGE P. SCHULTZ, now by succession, WILLIAM E. SIMON, Secretary of the Treasury of the United States, and ROGERS C. B. MORTON, Secretary of the Interior of the United States,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN R. FAUST, JR.
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Portland, Oregon 97204
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Of Attorneys for Amicus Curiae Association of O & C Counties

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-74

In the Supreme Court
of the United States
OCTOBER TERM, 1974

ROBERT BRADLEY JONES, HILDA STUBBNGS, SIDNEY FREEMAN, LLOYD SMITH, and MARY LOU IRVING, Members of TAXPAYERS' INVESTIGATIONAL COMMITTEE OF OREGON, an unincorporated association,

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Association of O & C Counties, by Hardy, Buttler, McEwen, Weiss & Newman, its attorneys, applies for permission to the court to file an amicus curiae brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit on file herein. The opposition brief accompanies this motion. In support of the motion, your applicant respectfully represents to the Court as follows:

Applicant is the Association referred to in paragraph XII of the Complaint filed by petitioners for certiorari. Applicant is an unincorporated association, whose membership consists of the elected governing officials of the 18 O & C Counties. Applicant appeared as amicus curiae in both the District Court and Ninth Circuit proceedings herein.

The Association, through its members and its executive committee, has for years been the main medium of communication among the governments of the O & C Counties as to matters involving the O & C Lands, as well as between the governments of these counties and the governments of the State of Oregon and the United States. The applicant has made extensive studies of every aspect of the O & C operation, including historical studies, economic studies and legal research. The applicant is thus uniquely capable of rendering the court assistance and advice which would contribute materially to the adequate representation of the interest of the defendants, would assist the court in reaching a proper decision, and would be in the public interests.

Because of the Association's intimate involvement with every aspect of O & C Lands matters and because allegations have been made in the Complaint which reflect adversely on the Association and on its members (see paragraphs XII, XV and XVIII of the Complaint), the Association has an interest in the case appropriate to this motion.

Dated this ... day of November, 1974.

JOHN R. FAUST, JR.
HARDY, BUTTLER, MCEWEN,
WEISS & NEWMAN
Of Attorneys for Amicus Curiae,
Association of O & C Counties

I hereby certify that I served the foregoing Motion for Leave to File a Brief Amicus Curiae in Opposition to Petition for Writ of Certiorari on Donald C. Walker, Attorney for Petitioners; Sidney I. Lezak, U. S. Attorney, and Jack G. Collins, Assistant U. S. Attorney, Attorneys for Respondents; and Robert H. Bork, Solicitor General; on the .....day of November, 1974, by mailing to each of them three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in sealed envelopes addressed to said attorneys, as follows: Donald C. Walker, Attorney for Petitioners, 2314 Lloyd Center, Portland, Oregon 97232; Sidney I. Lezak, U. S. Attorney, and Jack G. Collins, Assistant U. S. Attorney, Attorneys for Respondents, 506 United States Courthouse, Portland, Oregon 97205; Robert H. Bork, Solicitor General, Department of Justice, Constitution Avenue and 10th Street, N.W., Washington, D. C. 20530; which is their regular office addresses, or their addresses as last given by them on a document which they have filed in the within entitled cause and served on me; said envelopes, with first class postage prepaid, were then deposited in the United States Post Office at Portland, Oregon, on the day last above written.

.....

HARDY, BUTTLER, MCEWEN,
WEISS & NEWMAN
Of Attorneys for Amicus Curiae,
Association of O & C Counties.

SUPREME COURT, U. S.
FILED
DEC 16 1974
MICHAEL RODAK, JR., CLERK

74-444

In the Supreme Court of the United States

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ROBERT BRADLEY JONES, HILDA STUBBINGS, SIDNEY FREEMAN, LLOYD SMITH, and MARY LOU IRVING, members of TAXPAYERS' INVESTIGATIONAL COMMITTEE OF OREGON, an unincorporated association,

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN M. WINKLER,
1500 S. W. First Avenue
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Attorney for Amicus Curiae,
Oregon Homeowners Association

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-74

In the Supreme Court
of the United States

OCTOBER TERM, 1974

ROBERT BRADLEY JONES, HILDA STUBBINGS, SIDNEY FREEMAN, LLOYD SMITH, and MARY LOU IRVING, members of TAXPAYERS' INVESTIGATIONAL COMMITTEE OF OREGON, an unincorporated association,

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Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The OREGON HOMEOWNERS ASSOCIATION, by JOHN WINKLER, its attorney, applies for permission of the court to file an amicus curiae brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on file herein.

The supporting brief accompanies this motion.

Your applicant respectfully represents to the court the following:

1. Your applicant is a voluntary association of real property owners in the State of Oregon. The name of the association is the OREGON HOMEOWNERS ASSOCIATION and is made up of 3,300 members. This Association has been in existence for over 10 years and has concerned itself with the problems and interests of the homeowners as to county assessments and to take public stands that will bring an equitable assessment of county budgets for our members and all homeowners of the State of Oregon.

The OREGON HOMEOWNERS ASSOCIATION, through its members, has made in depth studies of the entire problem of real property taxation.

The particular issues involved in the Petition for Writ of Certiorari are important to your applicant. The OREGON HOMEOWNERS ASSOCIATION is seeking equitable answers to the real property taxation problem. When the McNary Act provides a formula for distribution of timber sales from Oregon timber and the 18 O&C counties fail to seek its enforcement, we are extremely concerned.

The proper distribution of the O&C funds would go a long way to ease the tax burden on real property.

The petitioners, in our judgment, have a sound and logical position that should be seriously considered.

In our belief, their position is founded on the his-

torical sequence of events that lead to the conclusion that:

(1) Oregon has a vested and beneficial interest in these lands.

(2) The formula of the McNary Act should be adhered to in distribution of the O&C funds.

The OREGON HOMEOWNERS ASSOCIATION is vitally concerned with this monumental issue and sincerely believes that because of its background, it can assist the court in a proper determination of the matter.

Dated this ..... day of December, 1974.

JOHN M. WINKLER,
Attorney for Amicus Curiae,
OREGON HOMEOWNERS ASSOCIATION
1500 S. W. First Avenue
Portland, Oregon 97201

In the Supreme Court

of the United States

OCTOBER TERM, 1974

74-444

ROBERT BRADLEY JONES, HILDA STUBBNGS, SIDNEY FREEMAN, LLOYD SMITH, and MARY LOU IRVING, Members of TAXPAYERS' INVESTIGATIONAL COMMITTEE OF OREGON, an unincorporated association,

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Respondents.

BRIEF OF AMICUS CURIAE ASSOCIATION OF O & C COUNTIES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF AMICUS CURIAE ASSOCIATION OF O & C COUNTIES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The primary purpose of this brief is to express the support of the 18 O & C Counties for the position of the respondents, and to detail the reasons for that support. It is not our intention to present a point for point rebuttal of the petition for certiorari.

Your amicus curiae is a voluntary unincorporated association of the County Commissioners of *all* the 18

counties in which the O & C Lands are located. It is, in effect, an unofficial but fully representative spokesman for those 18 county governments in matters involving the O & C Lands.

ARGUMENT

There are two aspects of the case upon which the Association should comment.

A. Question of standing.

Who is the real party in interest here? It is plain that the real party in interest in any claim for the payments demanded by petitioners would be the county governments.

The substantive law under which petitioners claim is the 1937 McNary Act, 50 Stat. 874, see Complaint, paragraphs X and XI. That statute provided that after repayment to the U. S. Treasury of "all reimbursable charges against the O & C Land Grant Fund," 25% of O & C revenues would be paid annually "*to the several counties*," referring to "the *counties* in which the lands revested . . . are situated," (see R-184).

Therefore, if there is an enforceable right under the 1937 McNary Act to the payment petitioners seek to compel, the governing substantive law on which petitioners rely has expressly vested that right in the "*counties*," and so the 18 O & C Counties are the real parties in interest.

Petitioners' prayer states that the money "belongs to the 18 O & C Counties" and asks that it be paid to the counties.

It is plain that the real parties in interest in any claim for the payments demanded by petitioner would be the county governments.

As the Ninth Circuit correctly concluded (see Opinion, p. 29 of Petition for Certiorari), petitioners are thus not the real parties in interest, and lack standing.

B. Reason for the Counties' position.

Your amicus curiae, speaking for the real parties in interest, wishes to explain why no county supports petitioners' suit. In brief, our position is this:

The relief prayed for by petitioners would be contrary to the best interests of the people of the O & C Counties, the State of Oregon, and the nation.

The present distribution formula and practice *insures* that 25% of the receipts of timber sales (this 25% is called the "plowback fund") is reinvested in intensive multiple use management of the lands. This 25% is *over and above* another 25% of the receipts which is committed by law to administration of the lands. This *certainty* of funding, not dependent on annual congressional appropriations which might be reduced or eliminated from year to year, makes possible long-term sustained-yield management planning. This has increased the timber sales receipts

six-fold in the years the "plowback" procedure has been followed; the allowable cut has been nearly *doubled* in the same time, all without prejudicing the multiple-use concept (water resources, recreation, wildlife habitat, forage, etc.).

This unique federal-local partnership has provided the best managed public timber resource in the country. Simply put, the counties would rather have 50% of the receipts of an ideally-managed forest resource than 75% of the receipts of a poorly-managed forest resource.

Their position is perhaps best expressed in a study by the University of Oregon, the *Significance of the O & C Forest Resource in Western Oregon*, 1968 (Bureau of Governmental Research and Service), as follows:

> "The revenue-sharing arrangement has much to do with creating this desirable situation. Three factors are believed to be significant: First, the established practice of plowing back one-third of the counties' share to intensify the development and management of these lands; second, the certainty of these plowed-back shares as a basis for long-range financing for these expenditures in contrast to the uncertainty of annual appropriations; and third, the built-in incentive for the counties and the local public to reinvest a portion of their share of receipts in order to perpetuate and increase the future returns, not only to secure the portion of the revenue they retain for county government, but for the related and very real benefits to economic activity and an improved environment."

The significance of these lands to the economy of Oregon gives all the people of Oregon a vested interest in their continued good management. This watchful local interest also assures the federal government and all the people of the United States that good management of this valuable asset will continue and be intensified. The resulting local developments will not only yield direct revenues to the Federal Treasury in the form of O & C receipts, but also indirectly yield additional revenues in the form of taxes on the corporations, their employees, and the related service industries.

This judgment has been shared by the elected officials of the counties and of the State of Oregon for over 20 years. That collective representative judgment should not be overturned at the behest of a small group of persons with passions and motivations of obscure origins.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JOHN R. FAUST, JR.
HARDY, BUTTLER, MCEWEN,
WEISS & NEWMAN
Of Attorneys for Amicus Curiae,
Association of O & C Counties

I hereby certify that I served the foregoing Brief of Amicus Curiae Association of O & C Counties in Opposition to Petition for Writ of Certiorari on Donald C. Walker, Attorney for Petitioners; Sidney I. Lezak, U. S. Attorney, and Jack G. Collins, Assistant U. S. Attorney, Attorneys for Respondents; and Robert H. Bork, Solicitor General; on the .....day of November, 1974, by mailing to each of them three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in sealed envelopes addressed to said attorneys, as follows: Donald C. Walker, Attorney for Petitioners, 2314 Lloyd Center, Portland, Oregon 97232; Sidney I. Lezak, U. S. Attorney, and Jack G. Collins, Assistant U. S. Attorney, Attorneys for Respondents, 506 United States Courthouse, Portland, Oregon 97205; Robert H. Bork, Solicitor General, Department of Justice, Constitution Avenue and 10th Street, N.W., Washington, D. C. 20530; which is their regular office addresses, or their addresses as last given by them on a document which they have filed in the within entitled cause and served on me; said envelopes, with first class postage prepaid, were then deposited in the United States Post Office at Portland, Oregon, on the day last above written.

.....

HARDY, BUTTLER, MCEWEN,
WEISS & NEWMAN
Of Attorneys for Amicus Curiae,
Association of O & C Counties

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Respondents.

PETITIONERS' ANSWER TO BRIEF OF AMICUS CURIAE ASSOCIATION OF O & C COUNTIES

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PETITIONERS' ANSWER TO BRIEF OF AMICUS CURIAE ASSOCIATION OF O & C COUNTIES

ARGUMENT

I. Association not statutorily created.

The Association is a voluntary association that is not authorized by law and its policies and meetings are not fully open to the public and its funds not audited by State Officers. No official report is made public.

II. Ninth Circuit ruling on standing.

The Association claims that the 18 counties are the real parties in interest. This proposition places the county officials beyond the reach of the people and runs contrary to the well-accepted rule of law that a public officer is subject to mandamus to compel compliance with a nondiscretionary duty.

These taxpayer petitioners are not in the same category as the federal taxpayer suits. Petitioners have a personal stake in a sum administratively diverted contrary to law, which sum their county officials won't pursue. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F.2d 718, 728 (2d Cir., 1969), cert. den. 399 U.S. 905, wherein the court stated:

> "Few more unseemly sights for a democratic country operating under a system of limited governmental power can be imagined than the specter of its courts standing powerless to prevent a clear transgression by the government of a constitutional right of a person with standing to assert it."

See *Pierce* v. *Green*, 294 N.W. 237 (Ia. 1940) at 248:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> ". . .
>
> "Courts of justice are established, not only to

decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government."

III. Reason for counties' position.

A. The Association may be able to state what its position is as a voluntary association but it should be careful not to give the impression it is speaking for the 18 O & C counties. Only through a duly constituted meeting of each County Commission can each county's position be expressed.

B. The Association, on page 3 of its brief, states:

> ". . . This 25% is over and above another 25% of the receipts which is committed by law to administration of the lands." [Emphasis supplied].

The Association admits by this statement that "another 25% . . . is *committed* to administration of the lands." [Emphasis supplied].

That is exactly what we are contending. That particular 25% is the fourth 25% under Title II of the McNary Act (50 Stat. 874). The truth of the matter is substantiated by the government's own figures. It simply is not spending the *committed* 25% on administration but is diverting millions of dollars into the general fund illegally. If given the opportunity, your petitioners can prove that beyond a shadow of a doubt.

C. On page 4, the Association refers to a "unique partnership." A partnership suggests and implies reciprocal rights. If petitioners' position is not adopted,

the so-called partnership is a sham, with the federal government being the landlord and the 18 O & C counties tenants at sufferance. This is not the intent of the Chamberlain-Ferris Act (39 Stat. 218) nor the McNary Act (50 Stat. 874).

D. On page 4, it refers to a study of Bureau of Government Research & Service. This Bureau is partly financed by the Association but in reviewing its opinion, it should be noted:

1. We agree that the government should *first* spend the fourth 25% as it is by law *committed* for administration. If more is needed, the counties and the government can reach an accord by proper means.

2. We contend that a well-run forest can be achieved by our suggested method just as well. Local participation would better insure proper spending. At the present time, our Congressmen would be hard put to explain how the money is spent.

3. Oregon, more than anyone, wants a properly-managed forest. The taxpayers favor sound economic policies just as much as anyone.

E. On page 5, the Association makes reference to a "vested interest." Its position leads to subserviency, as it leaves no basic rights in Oregon or the counties. We are at the mercy of the Congress under the Association's theory. The taxpayers are resting on the integrity of the *vested rights* already created by the Congress.

F. "Watchful local interest" as referred to on page

5 of the Association's brief is not sufficient to camouflage the consort that is taking place between the federal officials and the county officials who stand idly by and let the McNary Act be circumvented.

G. The Association also states that "collective judgment" should not be set aside "at the behest of a small group of persons with passions and motivations of obscure origins." What kind of a statement is that? Are small groups to be suspected of ulterior motives and large groups of altruistic motives?

The Association of O&C counties has a poor track record. Twenty years ago, it fought one county, Clackamas County, which was seeking a basic right under the McNary Act, *Clackamas County* v. *McKay*, 219 F.2d 479, and the counties have received tremendous benefits in spite of the Association.

The Association has consistently taken a position that leaves Oregon in a position of subserviency. It capitulates to the federal government's unfounded claim of plenary powers over these lands.

CONCLUSION

This case is unique and peculiar only to Oregon and granting standing and relief to petitioners does not open the door to numerous lawsuits and its determination settles the issue and brings finality to the controversy and is founded on law.

Respectfully submitted,

DONALD C. WALKER
2314 Lloyd Center
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Attorney for Petitioners